APR 1S 1941

(962, 963)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 962.

MARTIN M. GOLDMAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JACOB W. FRIEDMAN,
Attorney for Petitioner.

MARK SERVICE, BARCLAY 7-2180

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No. ——

MARTIN M. GOLDMAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Martin M. Goldman respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on March 26th, 1941, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on July 26th, 1940, convicting the petitioner of conspiracy (18 U. S. Code, Sec. 88) to attempt to obtain money for acting or forbearing to act in a bankruptcy proceeding (11 U. S. Code, Sec. 52 [b]).

Statement of Matters Involved.

Petitioner is a member of the New York and Federal bars. He was indicted, along with Jacob P. Shulman, likewise an attorney, and one Samuel I. Kandell. The conspiracy consisted, it was charged, in fraudulently causing a petition in bankruptcy to be filed against one Hymowitz and subsequently attempting to obtain $400 from several persons (principally one Robert Hoffman, attorney for the bankrupt and for his assignee) in consideration of causing the petition to be dismissed and forbearing to act in opposition to the dismissal.

As to defendant Kandell, the indictment was dismissed at the close of the Government's case (fol. 1593; subsequent numerical references indicate folio numbers in the transcript of record). The other defendants, including this petitioner, were found guilty after trial before the Hon. Sidney C. Mize, U. S. D. J., and each was sentenced to eighteen months imprisonment (2828, 2834-2835). Each defendant was admitted to bail pending appeal (2850), the learned trial judge recognizing the existence of "a substantial question," "a question that ought to be passed upon by an appellate court" (2845).

The details of the Government's case are outlined in the opinion of Chase, Cir. J., to which reference is respectfully made. Although the present application is predicated upon points of law, petitioner has at all times steadfastly insisted upon his innocence of any wrongdoing, and nothing herein contained is to be deemed in derogation of that position.

It is undisputed that Hoffman was acting in concert with representatives of the Federal Bureau of Investigation (607-609) for the dual purpose of entrapping and obtaining evidence against the several defendants. The manner in which these agents proceeded to obtain this evidence and the subsequent reception of the evidence

against defendants on the trial give rise to the important questions of constitutional right and statutory construction involved herein.

The trial was preceded by a preliminary motion to suppress the evidence procured by the Government in violation of defendants' constitutional rights and of the Communications Act of 1934 (47 U. S. C., Sec. 605). Upon consent of counsel the motion was reserved for the trial (32). While the matter was raised in the first instance by defendant Shulman, the resulting pre-trial hearing was actively participated in by this petitioner. On the request of their counsel the ruling to be made on the hearing was declared by the Court to apply to all the defendants (252). The adverse determination of the issues on that hearing was rendered with express exception to all the defendants (503), which was reiterated during the actual trial (1144-1145).

I.

During the evening of April 6th, 1937, while the alleged conspiracy was in progress, several agents of the Federal Bureau of Investigation, without warrant and without the permission of defendant Shulman, managed to obtain entrance to his office at 277 Broadway, New York City, in his absence. They studied the layout of the office and installed a microphone in an aperture between the wall of that office (Room 1509) and the adjoining vacant office (Room 1508). The microphone was connected by wire to an amplifier located in Room 1508. They tested it to see that it was working properly. The purpose, of course, was to enable them by listening in the adjoining office, to overhear conversations and sounds in Schulman's office (165-171, 196-198, 205, 217-220, 257-258, 261-276, 360). In addition to this listening device, they also affixed to the wall of the adjoining office an instrument known as a

detectaphone. This was a delicate crystal receiving apparatus capable of picking up and conducting through the wall all sounds emanating from Shulman's office and amplifying them so as to make them audible to persons listening in the adjoining office (280-281, 312, 478). The two instruments must be differentiated—needlessly and illogically, this petitioner contends—inasmuch as the Courts below professed to distinguish between the microphone in the hole and the detectaphone on the wall. The occasion for adopting different rules of law as to the two devices was afforded by the testimony of the Government agents that they abandoned the first and made use only of the second (359, 481). They gave this testimony notwithstanding the fact that in opposition to the motion to suppress, the Government submitted the affidavit of Special Agent Harold P. Turner describing in detail the installation of the hole microphone, declaring "the apparatus installed was solely for listening in on conversations taking place in Rooms 1509-1510", but not so much as mentioning the second device (the detectaphone) through which alone the agents thereafter testified that the conversations were heard (121-125, 408-419):

The determination of the trial Court as to each eavesdropping device is best noted *in haec verba*. As to the first (493-494):

> "As a conclusion of law I will hold that if any testimony were obtained from that first device, by which the wires were extended into the office of 1509, that if there had been any evidence obtained through that method I would have sustained an objection to it and suppressed that evidence, because I think it was an invasion of the defendant's constitutional rights. I think that was a trespass when they went into the office of 1509 by the method by which they did and undertook to install that device. And if any

testimony had been obtained through that device it would have been suppressed.

"I find as a fact, however, that no testimony was obtained through that device, and from the testimony of the witnesses for the Government produced, all of them say that none was obtained."

As to the second (the detectaphone, or microphone attached to the wall), the Court ruled (494-496):

"The other device that was installed was by lawful entry into room 1508. In so far as these defendants were concerned it was lawful. The Government agents attached this listening device to the wall in 1508, and heard some conversations. I think those conversations, if they are relevant to the issues involved upon the trial of the case on its merits, are competent and should not be suppressed; that there is no connection between the two devices, and the fact that they unlawfully entered the office of the defendants on April 6th, aided them in no way whatever in attaching the device to the wall in 1508 on the 7th of April; that I find from the testimony that they could have just as easily and just as well, by the method that they did adopt, of trying out various places on the wall in room 1508, and determined and located the space upon which this device should be attached there, as if they had never been in 1509, and that therefore the constitutional rights of the defendants were not violated by going into 1508 and there attaching listening instruments and taking down any conversations that they might have heard over that device solely, and that if the conversations that were heard are relevant to the issues to be heard on the merits of the case, then the testimony would be admissible and the objections of the defendants on

the ground that their constitutional rights were invaded would be overruled."

The testimony of the Federal Bureau of Investigation stenographer (1114-1357), consisting mainly of a reading of his stenotype notes of the conversations thus overheard—to which conversations petitioner, defendant Shulman and Hoffman were parties—was a substantial part of the Government's case against all the defendants.

As will more fully be explained in the subjoining brief, the entire process of installing, testing and using one of two alternative listening devices, constituted a single, simultaneous transaction, from which it is not possible to dissociate a legal component. Secondly, though the only instrumentality considered were the second apparatus, its use in the circumstances described would be an invasion of petitioner's constitutional rights.

II.

Wholly apart from anything that has yet been mentioned with regard to the microphone or microphones used by the Government agents, the process of scientific eavesdropping produced, *inter alia*, the contents of one end (namely, the end in Shulman's office) of at least seven telephone conversations. As soon as it developed through the testimony of the Government agents, counsel argued (502) "that there was an interception of telephone messages which in my opinion are just as much a violation of the Federal Communications Act of 1932 and 1933 as it would be as if those wires were tapped." The trial Court, however, ruled (502) "that that is not the type of telephone wires within the meaning of the Communications Act" and granted an exception applicable to all the defendants (503). Accordingly, and in pursuance of this ruling, the Government was permitted to read into

evidence the contents, so far as audible to the microphone, of these seven telephone conversations. Their location in the transcript of record is as follows:

1. Fols. 1225-1229.
2. Fols. 1238-1239.
3. Fols. 1239-1240.
4. Fols. 1260-1261.
5. Fol. 1299.
6. Fols. 1333-1345.
7. Fols. 1347-1348.

At least two of the conversations—the first and the sixth—relate directly to the subject-matter of the indictment, and clearly comprehend matter that is susceptible of an incriminating construction against the defendants. Indeed, the Circuit Court of Appeals in its opinion herein saw fit to quote at some length from the first of the conversations in aid of its holding that the evidence established the existence of the alleged conspiracy. Nevertheless, the Circuit Court ruled, "No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934 as construed in *Nardone* v. *United States*, 308 U. S. 338." Petitioner contends that this holding was error.

III.

Prior to their testifying, the several special agents of the Federal Bureau of Investigation refreshed their respective recollections by consulting the memoranda they had made with regard to the subject-matter of their testimony. It was admitted that each witness, before he took the stand, looked over the penciled notes made by him contemporaneously with the event as well as typewritten memoranda dictated by him therefrom; without utilizing this manner of refreshing his recollection, he would not

have been able to give divers essential details of the evidence (316-318, 367-396, 466-468, 1441-1446). The memoranda in question covered the important subjects of the entry into Shulman's office by the agents, the installation of both listening devices and the actual listening procedure. The witnesses admitted variations between their respective memoranda.

Under these circumstances the question arose both on the preliminary hearing (319-330, 367-387, 394-396, 451-453, 466-469) and on the trial (1408-1425, 1441-1455, 1471-1473) whether counsel for defendants should not be permitted to inspect these memoranda. While the trial Court, after inspecting one of the reports, dated April 9th, 1937, at first announced it would "permit that to be inspected and cross examined about" (378-379), it later reversed this ruling on the theory that inspection was barred unless the witness actually made use of the memorandum while on the stand (382-384, 1411-1413, 1423-1425, 1444-1446). The prejudicial nature of this holding appears from the following factor, among others: petitioner was precluded from ascertaining whether the Government agents in fact did any of their listening by means of the first device—which both the trial Court and the Circuit Court of Appeals held to have been installed by trespass to the extent that any of the fruits thereof would be rendered unavailable from the constitutional standpoint.

Questions Presented.

I.

(a) Was the reception of evidence against petitioner, which evidence was obtained by the employment of microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of one of the defendants, a violation of petitioner's

rights under the Fourth Amendment to the Constitution of the United States?

(b) Was the use of a detectaphone in an adjoining office for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, an invasion of petitioner's rights under the Fourth Amendment to the Constitution of the United States?

II.

Was the use of a detectaphone for the amplification and recording of portions of telephone conversations (without the authorization or consent of either party thereto), the contents of which were subsequently used as evidence against defendants in a criminal trial, an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act?

III.

(a) Is counsel for defendant in a criminal cause entitled to inspect a memorandum used by a Government witness to refresh his recollection prior to testifying?

(b) Where such a memorandum concededly relates to the manner of obtaining evidence and may involve proof of violation of defendant's constitutional rights, is the refusal to permit inspection thereof by counsel on a preliminary hearing an unauthorized curtailment of defendant's rights within the holding in *Nardone* v. *United States,* 308 U. S. 338?

Statute Involved.

Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; 47 U. S. C., Sec. 605) provides as follows:

> "Sec. 605. *Unauthorized publication or use of communications.* No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, shall divulge or publish the existence, contents, substance, purport, effect, or

meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Reasons for Allowance of Writ.

1. The decision of the Court below, holding admissible the evidence obtained by an unlawful invasion of the right of personal security, contravenes the Fourth Amendment as construed by applicable decisions of the Supreme Court of the United States.

2. The decision of the Court below sanctioning the use of evidence obtained by a detectaphone and ruling such practice not to be violative of the Fourth Amendment, is a decision upon an important point of Federal law which apparently has not been, but should be, settled by this Court.

3. The decision of the Court below permitting the ascertainment by detectaphone and the subsequent divulgence of the contents of telephone conversations, is a decision on a federal question that is either in conflict with applicable decisions of this Court or is upon an important point of Federal law which should be settled by this Court. In any event, it is a decision on a question of substance relating to the construction of a statute of the United States.

4. The decision of the Court below denying to counsel for petitioner the right to inspect memoranda utilized by

Government witnesses to refresh their recollections prior to testifying, is a decision on an important question of general law in a way that is probably untenable.

5. The decision denying the same right to inspect on the preliminary hearing, notwithstanding the strong likelihood of eliciting proof of invasion of constitutional rights, is a decision improperly abridging the scope of the preliminary hearing, and is a decision on a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., April 16th, 1941.

MARTIN M. GOLDMAN,
by JACOB W. FRIEDMAN,
Counsel for Petitioner,
Martin M. Goldman.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

MARTIN M. GOLDMAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York, except such as was expressed orally at the conclusion of the preliminary hearing (490-501).

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on March 26th, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C., Sec. 347.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors to be Urged.

It is intended by petitioner to urge all the errors assigned (3154-3194), unless limited by this Court, including the following:

1. The Government's use of evidence obtained through microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of one of the defendants, was a violation of petitioner's rights under the Fourth Amendment.

2. The use of a detectaphone in an office adjoining that of one of the defendants, for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, was an invasion of petitioner's rights under the Fourth Amendment.

3. The use of a detectaphone for the amplification and recording of portions of telephone conversations, without the authorization or consent of either party thereto, and the subsequent employment of these contents as evidence against petitioner in a criminal trial, constituted an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act.

4. It was reversible error to refuse counsel for petitioner the right to inspect memoranda used by Government witnesses to refresh their recollection prior to testifying.

5. Where such memoranda concededly relate to the manner of obtaining evidence and may involve proof of violation of petitioner's constitutional rights, the refusal to permit counsel an inspection thereof on a preliminary hearing was an illegal curtailment of petitioner's rights.

ARGUMENT.

1. The Government's use of evidence obtained through microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of one of the defendants, was a violation of petitioner's rights under the Fourth Amendment.

The outstanding factual features with respect to the installation of the two microphones by the Government agents are these, and all of them are undisputed:

That the transaction commenced with a trespass and unauthorized entry upon defendant Shulman's premises; that wires were illegally placed in that office for use in conjunction with the first microphone; that the placing of the first microphone and the second microphone (the detectaphone) constituted a simultaneous installation (315); that the testing of the first microphone—the allegedly discarded method—was effected by a trespass (288-289); that both methods of listening were tested and compared with a view towards utilizing the more efficient (313); that the trespass enabled the agents to ascertain the layout and the location of the desk, so as to facilitate the eventual listening (272-273, 337-338, 345-346); that the stenographer who assisted the Government agents listened through both microphones to determine which was better (480-482); and that the installation of both microphones was deemed a single job (402).

In this situation the differentiation between the two microphones by reason of the agents' insistence that they did their ultimate listening through the second, appears to be lacking in substance. In placing the detectaphone that the agents declared they finally used, they obviously and necessarily availed themselves of the information as to location of Shulman's desk and his telephone they acquired by virtue of their unlawful trespass upon the premises to which their listening was directed. The dis-

tinction thus introduced is a nicety that has no warrant in law and tends towards an improper abridgment of constitutional right. *Gouled* v. *United States*, 255 U. S. 298; *Weeks* v. *United States*, 235 U. S. 383; *Boyd* v. *United States*, 116 U. S. 616.

2. The use of a detectaphone in an office adjoining that of one of the defendants, for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, was an invasion of petitioner's rights under the Fourth Amendment.

This point raises the important question of whether the use of a detectaphone, wholly apart from the original trespass, constituted an invasion of the right of personal security and private property. This Court indicated, in *Boyd* v. *United States*, 116 U. S. 616, that the protection against unreasonable searches is not limited to a physical breaking of doors and rummaging of drawers. Likewise, in *Nardone* v. *United States*, 308 U. S. 338, the Court declared that it outlawed evidence obtained in certain fashions because "inconsistent with ethical standards and destructive of personal liberty." The dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U. S. 438, which are believed by many scholars to declare the present state of the law, clearly contemplated the utilization of new scientific means for the invasion of privacy. It is submitted that the devices employed herein were such as to come within the condemnation of constitutional principle. An analysis of the listening process establishes that the Government agents were using instruments that enabled them surreptitiously to commit a trespass upon the voices of the participants in the conversation.

It should also be noted in this connection that eavesdropping is a criminal offense under the laws of New York (Penal Law, Sec. 721).

3. The use of a detectaphone for the amplification and recording of portions of telephone conversations, without the authorization or consent of either party thereto, and the subsequent employment of these contents as evidence against petitioner in a criminal trial, constituted an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act.

A careful reading of the Federal Communications Act, Sec. 605, shows that, so far as pertinent herein, it forbids a person not authorized by the sender to intercept any communication and divulge its existence or contents. This Court has declared the statute applicable to both interstate and intrastate conversations (*Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321). Moreover, the Circuit Court of Appeals, Second Circuit, has properly ruled that even the consent of one of the parties to a telephone conversation is not sufficient warrant for its reception in evidence. *United States* v. *Polakoff,* 112 F. (2d) 888, cert. den. 3 U. S. Law Week 3096.

In the instant case the Government argued below that there was no interception because the conversation was heard before it was transformed into electrical impulses; the point was also made that the words spoken, when listened to, had not yet acquired the character of a telephone communication (respondent's brief below, p. 19). Petitioner herein contends that the argument advanced by respondent is altogether untenable. The essence of the statutory offense is an interception and divulgence without authorization by the sender. The statute in this connection refers neither to telephone wires nor to any contact therewith. It is not even necessary that the offender be aware of the entire communication, for he violates the law when he does so much as reveals without authorization the existence of the message.

The very circumstance that the same single sentence of the statute embraces both messages transmitted by wire and also those transmitted by radio is strongly indicative that no limitation or qualification whatsoever is placed upon the means or instrumentality employed to accomplish an inhibited interception. Obviously the interception of radio message does not necessitate any physical contact with the appurtenances of broadcasting or transmitting. The electrical impulses are transmitted through the air or through other substances and any appropriate receiving apparatus can reproduce them. In order to render the words or signals audible the receiving set is generally equipped with means of amplification. In this sense the radio impulses are in every manner legally comparable to sound waves of the human voice, which can also be gathered or detected by microphones and amplified to facilitate listening.

The suggestion that the words spoken in the instant case had not yet acquired the character of telephone communications is absurd. Once the speaker uttered them with the intent that they constitute a telephonic transmission, the protective force of the statute became operative, and no unauthorized person might thereafter divulge what he had managed to overhear as part of the conversation in question.

Had the Government agents, aware of the identity of any person to whom Shulman habitually telephoned, employed a detectaphone in the same fashion to listen in on the other end of the conversation, they thus could have reconstructed the entire conversation, and all without the consent of any party thereto. This would have been done without physical contact with any telephone apparatus or wire. In effect the intention of the illicit listeners and the results achieved by them would be identical with the products of ordinary wire-tapping. The statute makes no distinction at all between methods, and it is submitted that legal principle requires that no distinction be made.

4. It was reversible error to refuse counsel for petitioner the right to inspect memoranda used by Government witnesses to refresh their recollections prior to testifying.

In discussing the right of counsel who is cross-examining a witness to inspect papers used by the witness to refresh his recollection, the foremost American authority (Wigmore, 3rd Edition, Vol. 3, p. 111), declares that the right should apply to a memorandum consulted for refreshment before trial and not actually used by the witness while on the stand, for the risk of imposition and the need to safeguard are declared to be just as great. This principle is approved in *Kouba* v. *Horacek,* 53 Hun 636, 6 N. Y. S. 250; and *State* v. *Deslovers,* 40 R. I. 89, 100 Atl. 64, and was declared to be the law in *U. S.* v. *Socony Vacuum Oil Co.,* 7th Cir., 105 F. (2d) 809, 837 (reversed on other grounds, *U. S.* v. *Socony Vacuum Oil Co.,* 310 U. S. 150). In this connection petitioner submits that the dictum in *Lennon* v. *United States,* 20 F. (2d) 490, to the contrary is unsound, while the discussion relating to Grand Jury minutes in *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 231, *supra,* is inapplicable.

5. Where such memoranda concededly relate to the manner of obtaining evidence and may involve proof of violation of petitioner's constitutional rights, the refusal to permit counsel an inspection thereof on a preliminary hearing was an illegal curtailment of petitioner's rights.

The memoranda in question, as explained in the foregoing petition, were of the utmost importance to a determination of whether constitutional rights of defendants had been violated by the Government's agents' method of listening in on the conversation. The preliminary inquiry was obstructed by the refusal to permit defense counsel

to inspect the notes. The notes, made almost contemporaneously with the events to which they relate, would undoubtedly have shed light upon this significant preliminary question, especially in view of the demonstrated lack of candor of at least one of the witnesses (121-124). The serious inroad made by the trial Court on the investigation was contrary to the rules laid down in *Nardone* v. *United States,* 308 U. S. 338.

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for the writ of certiorari should be granted.

Respectfully submitted,

MARTIN M. GOLDMAN,
by JACOB W. FRIEDMAN,
Attorney for Martin M. Goldman,
Petitioner.

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MARK SERVICE, BARCLAY 7-2180

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. ——

JACOB P. SHULMAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Jacob P. Shulman respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on March 26th, 1941, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on July 26th, 1940, convicting the petitioner of conspiracy (18 U. S. Code, Sec. 88) to attempt to obtain money for acting or forbearing to act in a bankruptcy proceeding (11 U. S. Code, Sec. 52 [b]).

Statement of Matters Involved.

Petitioner is a member of the New York and Federal Bars, and was indicted with Martin M. Goldman and Theodore Goldman, attorneys, and one Samuel I. Kandell, for conspiracy. The conspiracy consisted, it was charged, in fraudulently causing a petition in bankruptcy to be filed against one Hymowitz and subsequently attempting to obtain $400 from several persons (principally one Robert Hoffman, attorney for the bankrupt and for his assignee) in consideration of causing the petition to be dismissed and forbearing to act in opposition to the dismissal.

As to defendant Kandell, the indictment was dismissed at the close of the Government's case (fol. 1593; subsequent numerical references indicate folio numbers in the transcript of record). The other defendants, including this petitioner, were found guilty after trial before the Hon. Sidney C. Mize, U. S. D. J., and each was sentenced to eighteen months imprisonment (2828, 2834-2835). Each defendant was admitted to bail pending appeal (2850), the learned trial judge recognizing the existence of "a substantial question," "a question that ought to be passed upon by an appellate court" (2845).

The details of the Government's case are outlined in the opinion of Chase, Circ. J., to which reference is respectfully made. Although the present application is predicated upon points of law, petitioner has at all times steadfastly insisted upon his innocence of any wrongdoing, and nothing herein contained is to be deemed in derogation of that position.

It is undisputed that Hoffman was acting in concert with representatives of the Federal Bureau of Investigation (607-609) for the dual purpose of entrapping and obtaining evidence against the several defendants. The

manner in which these agents proceeded to obtain this evidence and the subsequent reception of the evidence against defendants on the trial give rise to the important questions of constitutional right and statutory construction involved herein.

The trial was preceded by a preliminary motion to suppress the evidence procured by the Government in violation of defendant's constitutional rights and of the Communications Act of 1934 (47 U. S. C., Sec. 605). Upon consent of counsel the motion was reserved for the trial (32). While the matter was raised in the first instance by petitioner, the resulting pre-trial hearing was actively participated in by Martin M. Goldman and Theodore Goldman.

On the request of their counsel the ruling to be made on the hearing was declared by the Court to apply to all the defendants (252). The adverse determination of the issues on that hearing was rendered with express exception to all the defendants (503), which was reiterated during the actual trial (1144-1145).

I.

During the evening of April 6th, 1937, while the alleged conspiracy was in progress, several agents of the Federal Bureau of Investigation, without warrant and without the permission of petitioner, managed to obtain entrance to his office at 277 Broadway, New York City, in his absence. They studied the layout of the office and installed a microphone in an aperture between the wall of that office (Room 1509) and the adjoining vacant office (Room 1508). The microphone was connected by wire to an amplifier located in Room 1508. They tested it to see that it was working properly. The purpose, of course, was to enable them by listening in the adjoining office,

to overhear conversations and sounds in petitioner's office (165-171, 196-198, 205, 217-220, 257-258, 261-276, 360). In addition to this listening device, they also affixed to the wall of the adjoining office an instrument known as a detectaphone. This was a delicate crystal receiving apparatus capable of picking up and conducting through the wall all sounds emanating from petitioner's office and amplifying them so as to make them audible to persons listening in the adjoining office (280-281, 312, 478). The two instruments must be differentiated—needlessly and illogically petitioner contends—inasmuch as the Courts below professed to distinguish between the microphone in the hole and the detectaphone on the wall. The occasion for adopting different rules of law as to the two devices was afforded by the testimony of the Government agents that they abandoned the first and made use only of the second (359, 481). They gave this testimony notwithstanding the fact that in opposition to the motion to suppress, the Government submitted the affidavit of Special Agent Harold P. Turner describing in detail the installation of the hole microphone, declaring "the apparatus installed was solely for listening in on conversations taking place in Rooms 1509-1510", but not so much as mentioning the second device (the detectaphone) through which alone the agents thereafter testified that the conversations were heard (121-125, 408-419):

The determination of the trial Court as to each eavesdropping device is best noted *in haec verba*. As to the first (493-494):

> "As a conclusion of law I will hold that if any testimony were obtained from that first device, by which the wires were extended into the office of 1509, that if there had been any evidence obtained through that method I would have sustained an objection to it and suppressed that evidence, because I think it

was an invasion of the defendant's constitutional rights. I think that was a trespass when they went into the office of 1509 by the method by which they did and undertook to install that device. And if any testimony had been obtained through that device it would have been suppressed.

"I find as a fact, however, that no testimony was obtained through that device, and from the testimony of the witnesses for the Government produced, all of them say that none was obtained."

As to the second (the detectaphone, or microphone attached to the wall), the Court ruled (494-496):

"The other device that was installed was by lawful entry into room 1508. In so far as these defendants were concerned it was lawful. The Government agents attached this listening device to the wall in 1508, and heard some conversations. I think those conversations, if they are relevant to the issues involved upon the trial of the case on its merits, are competent and should not be suppressed; that there is no connection between the two devices, and the fact that they unlawfully entered the office of the defendants on April 6th, aided them in no way whatever in attaching the device to the wall in 1508 on the 7th of April; that I find from the testimony that they could have just as easily and just as well, by the method that they did adopt, of trying out various places on the wall in room 1508, and determined and located the space upon which this device should be attached there, as if they had never been in 1509, and that therefore the constitutional rights of the defendants were not violated by going into 1508 and there attaching listening instruments and taking down any conversations that they might have heard

> over that device solely, and that if the conversations that were heard are relevant to the issues to be heard on the merits of the case, then the testimony would be admissible and the objections of the defendants on the ground that their constitutional rights were invaded would be overruled."

The testimony of the Federal Bureau of Investigation stenographer (1114-1357) consisting mainly of a reading of his stenotype notes of the conversations thus overheard—to which conversations petitioner Jacob P. Shulman, defendant Martin M. Goldman and Hoffman were parties—was a substantial part of the Government's case against all the defendants.

As will more fully be explained in the subjoining brief, the entire process of installing, testing and using one of two alternative listening devices, constituted a single, simultaneous transaction, from which it is not possible to dissociate a legal component. Secondly, though the only instrumentality considered were the second apparatus, its use in the circumstances described would be an invasion of petitioner's constitutional rights.

II.

Wholly apart from anything that has yet been mentioned with regard to the microphone or microphones used by the Government agents, the process of scientific eavesdropping produced, *inter alia,* the contents of one end (namely, the end in petitioner's office) of at least seven telephone conversations. As soon as it developed through the testimony of the Government agents, counsel argued (502) "that there was an interception of telephone messages which in my opinion are just as much a violation of the Federal Communications Act of 1932 and 1933 as

it would be as if those wires were tapped." The trial Court, however, ruled (502) "that that is not the type of telephone wires within the meaning of the Communications Act" and granted an exception applicable to all the defendants (503). Accordingly, and in pursuance of this ruling, the Government was permitted to read into evidence the contents, so far as audible to the microphone, of these seven telephone conversations. Their location in the transcript of record is as follows:

1. Fols. 1225-1229.
2. Fols. 1238-1239.
3. Fols. 1239-1240.
4. Fols. 1260-1261.
5. Fol. 1299.
6. Fols. 1333-1345.
7. Fols. 1347-1348.

At least two of the conversations—the first and the sixth—relate directly to the subject-matter of the indictment, and clearly comprehend matter that is susceptible of an incriminating construction against the defendant. Indeed, the Circuit Court of Appeals in its opinion herein saw fit to quote at some length from the first of the conversations in aid of its holding that the evidence established the existence of the alleged conspiracy. Nevertheless, the Circuit Court ruled, "No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934 as construed in *Nardone* v. *United States,* 308 U. S. 338." Petitioner contends this holding was error.

III.

Prior to their testifying, the several special agents of the Federal Bureau of Investigation refreshed their respective recollections by consulting the memoranda they had made with regard to the subject-matter of their testimony. It was admitted that each witness, before he took the stand, looked over the penciled notes made by him contemporaneously with the event as well as typewritten memoranda dictated by him therefrom; without utilizing this manner of refreshing his recollection, he would not have been able to give divers essential details of the evidence (316-318, 367-396, 466-468, 1441-1446). The memoranda in question covered the important subjects of the entry into petitioner's office by the agents, the installation of both listening devices and the actual listening procedure. The witnesses admitted variations between their respective memoranda.

Under these circumstances the question arose both on the preliminary hearing (319-330, 367-387, 394-396, 451-453, 466-469) and on the trial (1408-1425, 1441-1455, 1471-1473) whether counsel for defendants should not be permitted to inspect these memoranda. While the trial Court, after inspecting one of the reports, dated April 9th, 1937, at first announced it would "permit that to be inspected and cross examined about" (378-379), it later reversed this ruling on the theory that inspection was barred unless the witness actually made use of the memorandum while on the stand (382-384, 1411-1413, 1423-1425, 1444-1446). The prejudicial nature of this holding appears from the following factor, among others: petitioner was precluded from ascertaining whether the Government agents in fact did any of their listening by means of the first device—which both the trial Court and the Circuit Court of Appeals held to have been installed by trespass to the extent that any of the fruits thereof would be rendered unavailable from the constitutional standpoint.

Questions Presented.

I.

(a) Was the reception of evidence against petitioner, which evidence was obtained by the employment of microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of petitioner, a violation of petitioner's rights under the Fourth Amendment to the Constitution of the United States?

(b) Was the use of a detectaphone in an adjoining office for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, an invasion of petitioner's rights under the Fourth Amendment to the Constitution of the United States?

II.

Was the use of a detectaphone for the amplification and recording of portions of telephone conversations (without the authorization or consent of either party thereto), the contents of which were subsequently used as evidence against defendant in a criminal trial, an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act?

III.

(a) Is counsel for defendant in a criminal cause entitled to inspect a memorandum used by a Government witness to refresh his recollection prior to testifying?

(b) Where such a memorandum concededly relates to the manner of obtaining evidence and may involve proof of violation of defendant's constitutional rights, is the re-

fusal to permit inspection thereof by counsel on a preliminary hearing an unauthorized curtailment of defendant's rights within the holding in *Nardone* v. *United States*, 308 U. S. 338?

Statute Involved.

Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; 47 U. S. C., Sec. 605) provides as follows:

> "Sec. 605. *Unauthorized publication or use of communications.* No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own bene-

fit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Reasons for Allowance of Writ.

1. The decision of the Court below, holding admissible the evidence obtained by an unlawful invasion of the right of personal security, contravenes the Fourth Amendment as construed by applicable decisions of the Supreme Court of the United States.

2. The decision of the Court below sanctioning the use of evidence obtained by a detectaphone and ruling such practice not to be violative of the Fourth Amendment, is a decision upon an important point of Federal law which apparently has not been, but should be, settled by this Court.

3. The decision of the Court below permitting the ascertainment by detectaphone and the subsequent divulgence of the contents of telephone conversations, is a decision on a federal question that is either in conflict with applicable decisions of this Court or is upon an im-

portant point of Federal law which should be settled by this Court. In any event, it is a decision on a question of substance relating to the construction of a statute of the United States.

4. The decision of the Court below denying to counsel for petitioner the right to inspect memoranda utilized by Government witnesses to refresh their recollections prior to testifying, is a decision on an important question of general law in a way that is probably untenable.

5. The decision denying the same right to inspect on the preliminary hearing, notwithstanding the strong likelihood of eliciting proof of invasion of constitutional rights, is a decision improperly abridging the scope of the preliminary hearing, and is a decision on a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., April 16th, 1941.

JACOB P. SHULMAN,
by JEREMIAH T. MAHONEY,
Counsel for Petitioner,
Jacob P. Shulman.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

JACOB P. SHULMAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York, except such as was expressed orally at the conclusion of the preliminary hearing (490-501).

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on March ~~10th~~ 24th, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C., Sec. 347.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors to be Urged.

It is intended by petitioner to urge all the errors assigned (3154-3194), unless limited by this Court, including the following:

1. The Government's use of evidence obtained through microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of petitioner, was a violation of petitioner's rights under the Fourth Amendment.

2. The use of a detectaphone in an office adjoining that of petitioner for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, was an invasion of petitioner's rights under the Fourth Amendment.

3. The use of a detectaphone for the amplification and recording of portions of telephone conversations, without the authorization or consent of either party thereto, and the subsequent employment of these contents as evidence against petitioner in a criminal trial, constituted an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act.

4. It was reversible error to refuse counsel for petitioner the right to inspect memoranda used by Government witnesses to refresh their recollection prior to testifying.

5. Where such memoranda concededly relate to the manner of obtaining evidence and may involve proof of violation of petitioner's constitutional rights, the refusal to permit counsel an inspection thereof on a preliminary hearing was an illegal curtailment of petitioner's rights.

ARGUMENT.

1. The Government's use of evidence obtained through microphones whose installation was accomplished and facilitated thorugh a trespass and illegal entry upon the premises of petitioner, was a violation of petitioner's rights under the Fourth Amendment.

The outstanding factual features with respect to the installation of the two microphones by the Government agents are these, and all of them are undisputed:

That the transaction commenced with a trespass and unauthorized entry upon petitioner's premises; that wires were illegally placed in his office for use in conjunction with the first microphone; that the placing of the first microphone and the second microphone (the detectaphone) constituted a simultaneous installation (315); that the testing of the first microphone—the allegedly discarded method—was effected by a trespass (288-289); that both methods of listening were tested and compared with a view towards utilizing the more efficient (313); that the trespass enabled the agents to ascertain the layout and the location of the desk, so as to facilitate the eventual listening (272-273, 337-338, 345-346); that the stenographer who assisted the Government agents listened through both microphones to determine which was better (480-482); and that the installation of both microphones was deemed a single job (402).

In this situation the differentiation between the two microphones by reason of the agents' insistence that they did their ultimate listening through the second, appears to be lacking in substance. In placing the detectaphone that the agents declared they finally used, they obviously and necessarily availed themselves of the information as to location of petitioner's desk and his telephone they acquired by virtue of their unlawful trespass upon the premises to which their listening was directed. The dis-

tinction thus introduced is a nicety that has no warrant in law and tends towards an improper abridgment of constitutional right. *Gouled* v. *United States,* 255 U. S. 298; *Weeks* v. *United States,* 235 U. S. 383; *Boyd* v. *United States,* 116 U. S. 616.

2. The use of a detectaphone in an office adjoining that of petitioner for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, was an invasion of petitioner's rights under the Fourth Amendment.

This point raises the important question of whether the use of a detectaphone, wholly apart from the original trespass, constituted an invasion of the right of personal security and private property. This Court indicated, in *Boyd* v. *United States,* 116 U. S. 616, that the protection against unreasonable searches is not limited to a physical breaking of doors and rummaging of drawers. Likewise, in *Nardone* v. *United States,* 308 U. S. 338, the Court declared that it outlawed evidence obtained in certain fashions because "inconsistent with ethical standards and destructive of personal liberty." The dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U. S. 438, which are believed by many scholars to declare the present state of the law, clearly contemplated the utilization of new scientific means for the invasion of privacy. It is submitted that the devices employed herein were such as to come within the condemnation of constitutional principle. An analysis of the listening process establishes that the Government agents were using instruments that enabled them surreptitiously to commit a trespass upon the voices of the participants in the conversation.

It should also be noted in this connection that eavesdropping is a criminal offense under the laws of New York (Penal Law, Sec. 721).

3. The use of a detectaphone for the amplification and recording of portions of telephone conversations, without the authorization or consent of either party thereto, and the subsequent employment of these contents as evidence against petitioner in a criminal trial, constituted an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act.

A careful reading of the Federal Communications Act, Sec. 605, shows that, so far as pertinent herein, it forbids a person not authorized by the sender to intercept any communication and divulge its existence or contents. This Court has declared the statute applicable to both interstate and intrastate conversations (*Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321). Moreover, the Circuit Court of Appeals, Second Circuit, has properly ruled that even the consent of one of the parties to a telephone conversation is not sufficient warrant for its reception in evidence. *United States* v. *Polakoff,* 112 F. (2d) 888, cert. den. 3 U. S. Law Week 3096.

In the instant case the Government argued below that there was no interception because the conversation was heard before it was transformed into electrical impulses; the point was also made that the words spoken, when listened to, had not yet acquired the character of a telephone communication (respondent's brief below, p. 19). Petitioner herein contends that the argument advanced by respondent is altogether untenable. The essence of the statutory offense is an interception and divulgence without authorization by the sender. The statute in this connection refers neither to telephone wires nor to any contact therewith. It is not even necessary that the offender be aware of the entire communication, for he violates the law when he does so much as reveals without authorization the existence of the message.

The very circumstance that the same single sentence of the statute embraces both messages transmitted by wire and also those transmitted by radio is strongly indicative that no limitation or qualification whatsoever is placed upon the means or instrumentality employed to accomplish an inhibited interception. Obviously the interception of radio message does not necessitate any physical contact with the appurtenances of broadcasting or transmitting. The electrical impulses are transmitted through the air or through other substances and any appropriate receiving apparatus can reproduce them. In order to render the words or signals audible the receiving set is generally equipped with means of amplification. In this sense the radio impulses are in every manner legally comparable to sound waves of the human voice, which can also be gathered or detected by microphones and amplified to facilitate listening.

The suggestion that the words spoken in the instant case had not yet acquired the character of telephone communications is absurd. Once the speaker uttered them with the intent that they constitute a telephonic transmission, the protective force of the statute became operative, and no unauthorized person might thereafter divulge what he had managed to overhear as part of the conversation in question.

Had the Government agents, aware of the identity of any person to whom petitioner habitually telephoned, employed a detectaphone in the same fashion to listen in on the other end of the conversation, they thus could have reconstructed the entire conversation, and all without the consent of any party thereto. This would have been done without physical contact with any telephone apparatus or wire. In effect the intention of the illicit listeners and the results achieved by them would be identical with the products of ordinary wire-tapping. The statute makes no distinction at all between methods, and it is submitted that legal principle requires that no distinction be made.

4. It was reversible error to refuse counsel for petitioner the right to inspect memoranda used by Government witnesses to refresh their recollections prior to testifying.

In discussing the right of counsel who is cross-examining a witness to inspect papers used by the witness to refresh his recollection, the foremost American authority (Wigmore, 3rd Edition, Vol. 3, p. 111), declares that the right should apply to a memorandum consulted for refreshment before trial and not actually used by the witness while on the stand, for the risk of imposition and the need to safeguard are declared to be just as great. This principle is approved in *Kouba* v. *Horacek,* 53 Hun 636, 6 N. Y. S. 250; and *State* v. *Deslovers,* 40 R. I. 89, 100 Atl. 64, and was declared to be the law in *U. S.* v. *Socony Vacuum Oil Co.,* 7th Cir., 105 F. (2d) 809, 837 (reversed on other grounds, *U. S.* v. *Socony Vacuum Oil Co.,* 310 U. S. 150). In this connection petitioner submits that the dictum in *Lennon* v. *United States,* 20 F. (2d) 490, to the contrary is unsound, while the discussion relating to Grand Jury minutes in *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 231, *supra,* is inapplicable.

5. Where such memoranda concededly relate to the manner of obtaining evidence and may involve proof of violation of petitioner's constitutional rights, the refusal to permit counsel an inspection thereof on a preliminary hearing was an illegal curtailment of petitioner's rights.

The memoranda in question, as explained in the foregoing petition, were of the utmost importance to a determination of whether constitutional rights of defendants had been violated by the Government's agents' method of listening in on the conversation. The preliminary inquiry

was obstructed by the refusal to permit defense counsel to inspect the notes. The notes, made almost contemporaneously with the events to which they relate, would undoubtedly have shed light upon this significant preliminary question, especially in view of the demonstrated lack of candor of at least one of the witnesses (121-124). The serious inroad made by the trial Court on the investigation was contrary to the rules laid down in *Nardone* v. *United States,* 308 U. S. 338.

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for the writ of certiorari should be granted.

Respectfully submitted,

JACOB P. SHULMAN.
By JEREMIAH T. MAHONEY,
Attorney for Jacob P. Shulman,
Petitioner.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 980

THEODORE GOLDMAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JACOB W. FRIEDMAN,
Attorney for Petitioner.

MARK SERVICE, BARCLAY 7-2180

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Your petitioner Theodore Goldman respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on March 26th, 1941, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on July 26th, 1940, convicting the petitioner of conspiracy (18 U. S. Code, Sec. 88) to attempt to obtain money for acting or forbearing to act in a bankruptcy proceeding (11 U. S. Code, Sec. 52 [b]).

Statement of Matters Involved.

Petitioner is a member of the New York and Federal bars. He was indicted, along with Jacob P. Shulman, and Martin M. Goldman, likewise attorneys, and one Samuel I. Kandell. The conspiracy consisted, it was charged, in fraudulently causing a petition in bankruptcy to be filed against one Hymowitz and subsequently attempting to obtain $400 from several persons (principally one Robert Hoffman, attorney for the bankrupt and for his assignee) in consideration of causing the petition to be dismissed and forbearing to act in opposition to the dismissal.

As to defendant Kandell, the indictment was dismissed at the close of the Government's case (fol. 1593; subsequent numerical references indicate folio numbers in the transcript of record). The other defendants, including this petitioner, were found guilty after trial before the Hon. Sidney C. Mize, U. S. D. J., and each was sentenced to eighteen months imprisonment (2828, 2834-2835). Each defendant was admitted to bail pending appeal (2850), the learned trial judge recognizing the existence of "a substantial question," "a question that ought to be passed upon by an appellate court" (2845).

The details of the Government's case are outlined in the opinion of Chase, Cir. J., to which reference is respectfully made. Although the present application is predicated upon points of law, petitioner has at all times steadfastly insisted upon his innocence of any wrongdoing, and nothing herein contained is to be deemed in derogation of that position.

It is undisputed that Hoffman was acting in concert with representatives of the Federal Bureau of Investigation (607-609) for the dual purpose of entrapping and obtaining evidence against the several defendants. The manner in which these agents proceeded to obtain this evidence and the subsequent reception of the evidence

against defendants on the trial give rise to the important questions of constitutional right and statutory construction involved herein.

The trial was preceded by a preliminary motion to suppress the evidence procured by the Government in violation of defendants' constitutional rights and of the Communications Act of 1934 (47 U. S. C., Sec. 605). Upon consent of counsel the motion was reserved for the trial (32). While the matter was raised in the first instance by defendant Shulman, the resulting pre-trial hearing was actively participated in by this petitioner. On the request of his counsel the ruling to be made on the hearing was declared by the Court to apply to all the defendants (252). The adverse determination of the issues on that hearing was rendered with express exception to all the defendants (503), which was reiterated during the actual trial (1144-1145).

I.

During the evening of April 6th, 1937, while the alleged conspiracy was in progress, several agents of the Federal Bureau of Investigation, without warrant and without the permission of defendant Shulman, managed to obtain entrance to his office at 277 Broadway, New York City, in his absence. They studied the layout of the office and installed a microphone in an aperture between the wall of that office (Room 1509) and the adjoining vacant office (Room 1508). The microphone was connected by wire to an amplifier located in Room 1508. They tested it to see that it was working properly. The purpose, of course, was to enable them by listening in the adjoining office, to overhear conversations and sounds in Schulman's office (165-171, 196-198, 205, 217-220, 257-258, 261-276, 360). In addition to this listening device, they also affixed to the wall of the adjoining office an instrument known as a

detectaphone. This was a delicate crystal receiving apparatus capable of picking up and conducting through the wall all sounds emanating from Shulman's office and amplifying them so as to make them audible to persons listening in the adjoining office (280-281, 312, 478). The two instruments must be differentiated—needlessly and illogically, this petitioner contends—inasmuch as the Courts below professed to distinguish between the microphone in the hole and the detectaphone on the wall. The occasion for adopting different rules of law as to the two devices was afforded by the testimony of the Government agents that they abandoned the first and made use only of the second (359, 481). They gave this testimony notwithstanding the fact that in opposition to the motion to suppress, the Government submitted the affidavit of Special Agent Harold P. Turner describing in detail the installation of the hole microphone, declaring "the apparatus installed was solely for listening in on conversations taking place in Rooms 1509-1510", but not so much as mentioning the second device (the detectaphone) through which alone the agents thereafter testified that the conversations were heard (121-125, 408-419):

The determination of the trial Court as to each eavesdropping device is best noted *in haec verba*. As to the first (493-494):

> "As a conclusion of law I will hold that if any testimony were obtained from that first device, by which the wires were extended into the office of 1509, that if there had been any evidence obtained through that method I would have sustained an objection to it and suppressed that evidence, because I think it was an invasion of the defendant's constitutional rights. I think that was a trespass when they went into the office of 1509 by the method by which they did and undertook to install that device. And if any

testimony had been obtained through that device it would have been suppressed.

"I find as a fact, however, that no testimony was obtained through that device, and from the testimony of the witnesses for the Government produced, all of them say that none was obtained."

As to the second (the detectaphone, or microphone attached to the wall), the Court ruled (494-496):

"The other device that was installed was by lawful entry into room 1508. In so far as these defendants were concerned it was lawful. The Government agents attached this listening device to the wall in 1508, and heard some conversations. I think those conversations, if they are relevant to the issues involved upon the trial of the case on its merits, are competent and should not be suppressed; that there is no connection between the two devices, and the fact that they unlawfully entered the office of the defendants on April 6th, aided them in no way whatever in attaching the device to the wall in 1508 on the 7th of April; that I find from the testimony that they could have just as easily and just as well, by the method that they did adopt, of trying out various places on the wall in room 1508, and determined and located the space upon which this device should be attached there, as if they had never been in 1509, and that therefore the constitutional rights of the defendants were not violated by going into 1508 and there attaching listening instruments and taking down any conversations that they might have heard over that device solely, and that if the conversations that were heard are relevant to the issues to be heard on the merits of the case, then the testimony would be admissible and the objections of the defendants on

the ground that their constitutional rights were invaded would be overruled."

The testimony of the Federal Bureau of Investigation stenographer (1114-1357), consisting mainly of a reading of his stenotype notes of the conversations thus overheard—to which conversations, defendant Shulman, defendant Martin Goldman and Hoffman were parties—was a substantial part of the Government's case against all the defendants.

As will more fully be explained in the subjoining brief, the entire process of installing, testing and using one of two alternative listening devices, constituted a single, simultaneous transaction, from which it is not possible to dissociate a legal component. Secondly, though the only instrumentality considered were the second apparatus, its use in the circumstances described would be an invasion of petitioner's constitutional rights.

II.

Wholly apart from anything that has yet been mentioned with regard to the microphone or microphones used by the Government agents, the process of scientific eavesdropping produced, *inter alia*, the contents of one end (namely, the end in Shulman's office) of at least seven telephone conversations. As soon as it developed through the testimony of the Government agents, counsel argued (502) "that there was an interception of telephone messages which in my opinion are just as much a violation of the Federal Communications Act of 1932 and 1933 as it would be as if those wires were tapped." The trial Court, however, ruled (502) "that that is not the type of telephone wires within the meaning of the Communications Act" and granted an exception applicable to all the defendants (503). Accordingly, and in pursuance of this ruling, the Government was permitted to read into

evidence the contents, so far as audible to the microphone, of these seven telephone conversations. Their location in the transcript of record is as follows:

1. Fols. 1225-1229.
2. Fols. 1238-1239.
3. Fols. 1239-1240.
4. Fols. 1260-1261.
5. Fol. 1299.
6. Fols. 1333-1345.
7. Fols. 1347-1348.

At least two of the conversations—the first and the sixth—relate directly to the subject-matter of the indictment, and clearly comprehend matter that is susceptible of an incriminating construction against the defendants. Indeed, the Circuit Court of Appeals in its opinion herein saw fit to quote at some length from the first of the conversations in aid of its holding that the evidence established the existence of the alleged conspiracy. Nevertheless, the Circuit Court ruled, "No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934 as construed in *Nardone* v. *United States*, 308 U. S. 338." Petitioner contends that this holding was error.

III.

Prior to their testifying, the several special agents of the Federal Bureau of Investigation refreshed their respective recollections by consulting the memoranda they had made with regard to the subject-matter of their testimony. It was admitted that each witness, before he took the stand, looked over the penciled notes made by him contemporaneously with the event as well as typewritten memoranda dictated by him therefrom; without utilizing this manner of refreshing his recollection, he would not

have been able to give divers essential details of the evidence (316-318, 367-396, 466-468, 1441-1446). The memoranda in question covered the important subjects of the entry into Shulman's office by the agents, the installation of both listening devices and the actual listening procedure. The witnesses admitted variations between their respective memoranda.

Under these circumstances the question arose both on the preliminary hearing (319-330, 367-387, 394-396, 451-453, 466-469) and on the trial (1408-1425, 1441-1455, 1471-1473) whether counsel for defendants should not be permitted to inspect these memoranda. While the trial Court, after inspecting one of the reports, dated April 9th, 1937, at first announced it would "permit that to be inspected and cross examined about" (378-379), it later reversed this ruling on the theory that inspection was barred unless the witness actually made use of the memorandum while on the stand (382-384, 1411-1413, 1423-1425, 1444-1446). The prejudicial nature of this holding appears from the following factor, among others: petitioner was precluded from ascertaining whether the Government agents in fact did any of their listening by means of the first device—which both the trial Court and the Circuit Court of Appeals held to have been installed by trespass to the extent that any of the fruits thereof would be rendered unavailable from the constitutional standpoint.

Questions Presented.

I.

(a) Was the reception of evidence against petitioner, which evidence was obtained by the employment of microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of one of the defendants, a violation of petitioner's

rights under the Fourth Amendment to the Constitution of the United States?

(b) Was the use of a detectaphone in an adjoining office for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, an invasion of petitioner's rights under the Fourth Amendment to the Constitution of the United States?

II.

Was the use of a detectaphone for the amplification and recording of portions of telephone conversations (without the authorization or consent of either party thereto), the contents of which were subsequently used as evidence against defendants in a criminal trial, an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act?

III.

(a) Is counsel for defendant in a criminal cause entitled to inspect a memorandum used by a Government witness to refresh his recollection prior to testifying?

(b) Where such a memorandum concededly relates to the manner of obtaining evidence and may involve proof of violation of defendant's constitutional rights, is the refusal to permit inspection thereof by counsel on a preliminary hearing an unauthorized curtailment of defendant's rights within the holding in *Nardone* v. *United States,* 308 U. S. 338?

Statute Involved.

Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; 47 U. S. C., Sec. 605) provides as follows:

> "Sec. 605. *Unauthorized publication or use of communications.* No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, shall divulge or publish the existence, contents, substance, purport, effect, or

meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Reasons for Allowance of Writ.

1. The decision of the Court below, holding admissible the evidence obtained by an unlawful invasion of the right of personal security, contravenes the Fourth Amendment as construed by applicable decisions of the Supreme Court of the United States.

2. The decision of the Court below sanctioning the use of evidence obtained by a detectaphone and ruling such practice not to be violative of the Fourth Amendment, is a decision upon an important point of Federal law which apparently has not been, but should be, settled by this Court.

3. The decision of the Court below permitting the ascertainment by detectaphone and the subsequent divulgence of the contents of telephone conversations, is a decision on a federal question that is either in conflict with applicable decisions of this Court or is upon an important point of Federal law which should be settled by this Court. In any event, it is a decision on a question of substance relating to the construction of a statute of the United States.

4. The decision of the Court below denying to counsel for petitioner the right to inspect memoranda utilized by

Government witnesses to refresh their recollections prior to testifying, is a decision on an important question of general law in a way that is probably untenable.

5. The decision denying the same right to inspect on the preliminary hearing, notwithstanding the strong likelihood of eliciting proof of invasion of constitutional rights, is a decision improperly abridging the scope of the preliminary hearing, and is a decision on a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., April 22nd, 1941.

THEODORE GOLDMAN,
by JACOB W. FRIEDMAN,
Counsel for Petitioner,
Theodore Goldman.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

THEODORE GOLDMAN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York, except such as was expressed orally at the conclusion of the preliminary hearing (490-501).

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on March 26th, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C., Sec. 347.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors to be Urged.

It is intended by petitioner to urge all the errors assigned (3154-3194), unless limited by this Court, including the following:

1. The Government's use of evidence obtained through microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of one of the defendants, was a violation of petitioner's rights under the Fourth Amendment.

2. The use of a detectaphone in an office adjoining that of one of the defendants, for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, was an invasion of petitioner's rights under the Fourth Amendment.

3. The use of a detectaphone for the amplification and recording of portions of telephone conversations, without the authorization or consent of either party thereto, and the subsequent employment of these contents as evidence against petitioner in a criminal trial, constituted an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act.

4. It was reversible error to refuse counsel for petitioner the right to inspect memoranda used by Government witnesses to refresh their recollection prior to testifying.

5. Where such memoranda concededly relate to the manner of obtaining evidence and may involve proof of violation of petitioner's constitutional rights, the refusal to permit counsel an inspection thereof on a preliminary hearing was an illegal curtailment of petitioner's rights.

ARGUMENT.

1. The Government's use of evidence obtained through microphones whose installation was accomplished and facilitated through a trespass and illegal entry upon the premises of one of the defendants, was a violation of petitioner's rights under the Fourth Amendment.

The outstanding factual features with respect to the installation of the two microphones by the Government agents are these, and all of them are undisputed:

That the transaction commenced with a trespass and unauthorized entry upon defendant Shulman's premises; that wires were illegally placed in that office for use in conjunction with the first microphone; that the placing of the first microphone and the second microphone (the detectaphone) constituted a simultaneous installation (315); that the testing of the first microphone—the allegedly discarded method—was effected by a trespass (288-289); that both methods of listening were tested and compared with a view towards utilizing the more efficient (313); that the trespass enabled the agents to ascertain the layout and the location of the desk, so as to facilitate the eventual listening (272-273, 337-338, 345-346); that the stenographer who assisted the Government agents listened through both microphones to determine which was better (480-482); and that the installation of both microphones was deemed a single job (402).

In this situation the differentiation between the two microphones by reason of the agents' insistence that they did their ultimate listening through the second, appears to be lacking in substance. In placing the detectaphone that the agents declared they finally used, they obviously and necessarily availed themselves of the information as to location of Shulman's desk and his telephone they acquired by virtue of their unlawful trespass upon the premises to which their listening was directed. The dis-

tinction thus introduced is a nicety that has no warrant in law and tends towards an improper abridgment of constitutional right. *Gouled* v. *United States,* 255 U. S. 298; *Weeks* v. *United States,* 235 U. S. 383; *Boyd* v. *United States,* 116 U. S. 616.

2. The use of a detectaphone in an office adjoining that of one of the defendants, for the amplification and recording of defendants' conversations for subsequent use as evidence against them in a criminal trial, was an invasion of petitioner's rights under the Fourth Amendment.

This point raises the important question of whether the use of a detectaphone, wholly apart from the original trespass, constituted an invasion of the right of personal security and private property. This Court indicated, in *Boyd* v. *United States,* 116 U. S. 616, that the protection against unreasonable searches is not limited to a physical breaking of doors and rummaging of drawers. Likewise, in *Nardone* v. *United States,* 308 U. S. 338, the Court declared that it outlawed evidence obtained in certain fashions because "inconsistent with ethical standards and destructive of personal liberty." The dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead* v. *United States,* 277 U. S. 438, which are believed by many scholars to declare the present state of the law, clearly contemplated the utilization of new scientific means for the invasion of privacy. It is submitted that the devices employed herein were such as to come within the condemnation of constitutional principle. An analysis of the listening process establishes that the Government agents were using instruments that enabled them surreptitiously to commit a trespass upon the voices of the participants in the conversation.

It should also be noted in this connection that eavesdropping is a criminal offense under the laws of New York (Penal Law, Sec. 721).

3. The use of a detectaphone for the amplification and recording of portions of telephone conversations, without the authorization or consent of either party thereto, and the subsequent employment of these contents as evidence against petitioner in a criminal trial, constituted an illegal interception and divulgence within the meaning of Section 605 of the Federal Communications Act.

A careful reading of the Federal Communications Act, Sec. 605, shows that, so far as pertinent herein, it forbids a person not authorized by the sender to intercept any communication and divulge its existence or contents. This Court has declared the statute applicable to both interstate and intrastate conversations (*Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321). Moreover, the Circuit Court of Appeals, Second Circuit, has properly ruled that even the consent of one of the parties to a telephone conversation is not sufficient warrant for its reception in evidence. *United States* v. *Polakoff,* 112 F. (2d) 888, cert. den. 3 U. S. Law Week 3096.

In the instant case the Government argued below that there was no interception because the conversation was heard before it was transformed into electrical impulses; the point was also made that the words spoken, when listened to, had not yet acquired the character of a telephone communication (respondent's brief below, p. 19). Petitioner herein contends that the argument advanced by respondent is altogether untenable. The essence of the statutory offense is an interception and divulgence without authorization by the sender. The statute in this connection refers neither to telephone wires nor to any contact therewith. It is not even necessary that the offender be aware of the entire communication, for he violates the law when he does so much as reveals without authorization the existence of the message.

The very circumstance that the same single sentence of the statute embraces both messages transmitted by wire and also those transmitted by radio is strongly indicative that no limitation or qualification whatsoever is placed upon the means or instrumentality employed to accomplish an inhibited interception. Obviously the interception of radio message does not necessitate any physical contact with the appurtenances of broadcasting or transmitting. The electrical impulses are transmitted through the air or through other substances and any appropriate receiving apparatus can reproduce them. In order to render the words or signals audible the receiving set is generally equipped with means of amplification. In this sense the radio impulses are in every manner legally comparable to sound waves of the human voice, which can also be gathered or detected by microphones and amplified to facilitate listening.

The suggestion that the words spoken in the instant case had not yet acquired the character of telephone communications is absurd. Once the speaker uttered them with the intent that they constitute a telephonic transmission, the protective force of the statute became operative, and no unauthorized person might thereafter divulge what he had managed to overhear as part of the conversation in question.

Had the Government agents, aware of the identity of any person to whom Shulman habitually telephoned, employed a detectaphone in the same fashion to listen in on the other end of the conversation, they thus could have reconstructed the entire conversation, and all without the consent of any party thereto. This would have been done without physical contact with any telephone apparatus or wire. In effect the intention of the illicit listeners and the results achieved by them would be identical with the products of ordinary wire-tapping. The statute makes no distinction at all between methods, and it is submitted that legal principle requires that no distinction be made.

4. It was reversible error to refuse counsel for petitioner the right to inspect memoranda used by Government witnesses to refresh their recollections prior to testifying.

In discussing the right of counsel who is cross-examining a witness to inspect papers used by the witness to refresh his recollection, the foremost American authority (Wigmore, 3rd Edition, Vol. 3, p. 111), declares that the right should apply to a memorandum consulted for refreshment before trial and not actually used by the witness while on the stand, for the risk of imposition and the need to safeguard are declared to be just as great. This principle is approved in *Kouba* v. *Horacek,* 53 Hun 636, 6 N. Y. S. 250; and *State* v. *Deslovers,* 40 R. I. 89, 100 Atl. 64, and was declared to be the law in *U. S.* v. *Socony Vacuum Oil Co.,* 7th Cir., 105 F. (2d) 809, 837 (reversed on other grounds, *U. S.* v. *Socony Vacuum Oil Co.,* 310 U. S. 150). In this connection petitioner submits that the dictum in *Lennon* v. *United States,* 20 F. (2d) 490, to the contrary is unsound, while the discussion relating to Grand Jury minutes in *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 231, *supra,* is inapplicable.

5. Where such memoranda concededly relate to the manner of obtaining evidence and may involve proof of violation of petitioner's constitutional rights, the refusal to permit counsel an inspection thereof on a preliminary hearing was an illegal curtailment of petitioner's rights.

The memoranda in question, as explained in the foregoing petition, were of the utmost importance to a determination of whether constitutional rights of defendants had been violated by the Government's agents' method of listening in on the conversation. The preliminary inquiry was obstructed by the refusal to permit defense counsel

to inspect the notes. The notes, made almost contemporaneously with the events to which they relate, would undoubtedly have shed light upon this significant preliminary question, especially in view of the demonstrated lack of candor of at least one of the witnesses (121-124). The serious inroad made by the trial Court on the investigation was contrary to the rules laid down in *Nardone* v. *United States,* 308 U. S. 338.

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for the writ of certiorari should be granted.

Respectfully submitted,

THEODORE GOLDMAN,
by JACOB W. FRIEDMAN,
Attorney for Theodore Goldman,
Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 962, 963, 980

MARTIN M. GOLDMAN, JACOB P. SHULMAN AND THEODORE GOLDMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court of the United States for the Southern District of New York, other than the oral ruling on the preliminary motion to suppress evidence (R. 81–82, 164–168). The opinion of the Circuit Court of Appeals affirming the convictions (R. 1089–1096) is reported at 118 F. (2d) 310.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1941 (R. 1104). Petitions

for writs of certiorari were filed on behalf of Martin M. Goldman and Jacob P. Shulman (Nos. 962 and 963) on April 18, 1941, and on behalf of Theodore Goldman (No. 980) on April 23, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether evidence obtained by eavesdropping upon conversations in an adjoining room by means of a "detectaphone"—a listening device which amplifies sound vibrations coming through the wall—should be excluded in federal courts, because such eavesdropping constitutes a "search" prohibited by the Fourth Amendment.

2. Whether the use of a detectaphone for the purpose of overhearing one end of a telephone conversation in an adjoining room constitutes an interception of a telephone communication prohibited by Section 605 of the Federal Communications Act.

3. Whether petitioners were entitled to inspect official memoranda prepared by federal agents from which they refreshed their recollections before being sworn as witnesses.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605) provides in part as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

STATEMENT

Petitioners and one Kandell were indicted on February 1, 1940 (R. 9), in the United States District Court for the Southern District of New York for conspiracy to violate 11 U. S. C. Section 52 (b) (5). The one-count indictment charged in part that the defendants conspired to file a petition in bankruptcy and to cause it to be dismissed in consideration of fraudulently receiving a sum of approximately $400.00 from one Robert Hoffman and others (R. 3–7). The indictment was dismissed as to Kandell at the close of the Government's case (R. 531). The petitioners were convicted on July 26, 1940 (R. 943), and each of them received a sentence of eighteen months' imprisonment and a fine of $25.00 (R. 14, 16, 18). The convictions were unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 1104). The petitioners have filed separate, but substantially identical, petitions for writs of certiorari.

The evidence showed that one Hymovitz made an assignment for the benefit of creditors to Robert Hoffman, an attorney (R. 176–178). The petitioners, counsel for certain creditors, proposed to Hoffman that the assets of Hymovitz should be sold in bulk to a purchaser who would pay enough to allow for a 40% settlement with creditors and for some expenses and in addition $400.00 to be kept secret and divided among the conspirators (R. 193–194, 201–202, 211). Upon Hoffman's refusal to join in this plan, petitioners filed an involuntary bankruptcy petition which was drawn up in such a manner that it could be dismissed without notice to creditors in case Hoffman should change his mind (R. 196, 202). Hoffman disclosed the facts to the Federal Bureau of Investigation and thereafter pretended to acquiesce in the petitioners' plan (R. 202–203, 247–248).

On the night of February 6, 1937, two agents of the Federal Bureau of Investigation, Turner and Ransom, went to the office building where petitioner Shulman had his law office, and with the consent and assistance of the building superintendent, but without the knowledge of Shulman, obtained entrance to Shulman's office, Room 1509, and to the adjoining office, Room 1508, which was unoccupied (R. 45–46, 53, 56–57, 88). There was a small opening for a steam pipe at the base of the wall between the two offices. Through the space between the pipe and the edge of the aperture the

agents passed a wire into Room 1508 far enough to attach a small disc-shaped "carbon microphone." The microphone was then drawn back into the hole until it was about an inch inside the wallpaper surface of Shulman's office (R. 87–89). In Room 1508 the wire was attached to an amplifier and headphones. The agents tested the installation and finding that it enabled them to overhear conversations carried on in Room 1509 disconnected the amplifier and phones and departed leaving only the microphone in the wall with a small piece of wire leading into Room 1508 (R. 86–87, 90, 96–97).

The following afternoon, Turner returned to Room 1508, accompanied by agents Schroeder and Rubenstein and a stenographer. They brought with them the amplifier and earphones, which were once more connected with the carbon microphone (R. 100). They also installed another device known as a contact microphone or detectaphone which was equipped with a separate amplifier and earphones (R. 101, 104). The detectaphone operated by being placed against the wall of Room 1508 where it picked up sound vibrations coming through the wall from the adjoining office (R. 94, 104). Turner, who had been in Shulman's office the previous night, described its arrangement to Schroeder (R. 103, 112–113), but the proper location of the detectaphone was determined by trial and error. Schroeder moved it over the wall until

he found the best position (R. 113–117, 119–120). It was discovered that the carbon microphone in the wall, probably because the steam was now turned on in the pipe, yielded nothing intelligible, and this apparatus was dismantled (R. 98, 102, 105–106, 119–123, 152, 160–161).

Employing only the detectaphone, the agents listened to conversations in Shulman's office on the afternoon of April 7 and again on April 14, 21, and 26. The stenographer took down on a stenotype machine all that could be overheard, including conversations between Martin M. Goldman, Shulman, and Hoffman, as well as Shulman's end of several telephone conversations (R. 118–119, 160–161, 152–156).

Before the trial, there was filed a motion to suppress illegally obtained evidence (R. 20–27). A preliminary hearing was held, and at its conclusion the trial court ruled (1) that no evidence had been obtained from the carbon microphone which was installed by means of the trespass in Shulman's office; (2) that the unlawful entry for the purpose of installing the carbon microphone did not facilitate the installation or use of the detectaphone, and (3) that evidence obtained through the detectaphone was not obtained in violation of the Fourth Amendment or Section 605 of the Federal Communications Act (R. 164–168).

At the preliminary hearing and again at the trial defense counsel claimed the right to inspect notes

and memoranda made by the agents in the course of the investigation and to require the production of such papers from the files of the Federal Bureau of Investigation (R. 107, 108, 125, 156, 471, 482). It appeared that the agents had reviewed these notes and memoranda before testifying (R. 106, 132). The trial court noted that the memoranda were confidential communications between the investigating officers of the Government (R. 477–478), and ruled that counsel had no right to inspect them since they were not used by the witnesses to refresh their recollection while on the stand (R. 128–129, 470–472, 474, 482–485). Also the court, having examined the documents, was of the opinion at the preliminary hearing that the documents called for contained matter, having no bearing on the legality of the investigating methods, which the Government should not be required to disclose to the defense in advance of trial (R. 109–111, 127).

ARGUMENT

I

The holding of the Circuit Court of Appeals that the use of the detectaphone did not constitute a search within the meaning of the Fourth Amendment (R. 1095) is plainly correct. The detectaphone was installed by lawful entry into Room 1508, and its installation and use were in no wise facilitated by the previous trespass into Shulman's office for the purpose of installing the car-

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bon microphone (Finding of trial judge on preliminary hearing, R. 165).[1] The use of this device involved nothing more than observation from the outside of events transpiring within the privileged zone of Shulman's office. It was as if the agents had seen the actual commission of the crime by looking through the windows of Shulman's office, as was done in the *Agnello* case, (*Agnello* v. *United States*), 269 U. S. 20 at 28–29, and in *United States* v. *Feldman,* 104 F. (2d) 255 (C. C. A. 3, 1939), certiorari denied, 308 U. S. 579. As the court below pointed out (R. 1095), mere use of mechanical aids to the human senses, e. g., a field glass or a searchlight, without any physical intrusion on defendant's premises, has never been regarded as converting observation into "search." *United States* v. *Lee,* 274 U. S. 559; *Smith* v. *United States,* 2 F. (2d) 715 (C. C. A. 4, 1924). In no case which has come to our attention has testimony been excluded on the ground that it was obtained by eavesdropping with or without scientific aids. *Schoborg* v. *United States,* 264 Fed. 1 (C. C. A. 6, 1920), certiorari denied, 253 U. S. 494; *United States* v.

[1] At R. 103, 112–113 and 115, Schroeder testified that Agent Turner, who had been in Shulman's office on the night of April 6, 1937, described the lay-out of the office to him and that this helped somewhat in selecting a location for the detectaphone. But at R. 101 and 116–117, Schroeder testified unequivocally that the location was actually selected by experiment. Agent Turner witnessed the experiments in connection with the placing of the detectaphone (R. 119–120).

Weiss, 34 F. Supp. 99, 101 (S. D. N. Y., 1940); *People* v. *Cotta*, 49 Cal. 166 (1874); *State* v. *Allen and Carter*, 37 La. Ann. 685 (1885); *Goode* v. *State*, 158 Miss. 616 (1930); *De Lore* v. *Smith*, 67 Ore. 306 (1913); *Commonwealth* v. *Wakelin*, 230 Mass. 567 (1918); *State* v. *Minneapolis Mills Co.*, 124 Minn. 34, 43 (1913); *Commonwealth* v. *Everson*, 123 Ky. 330 (1906).

Petitioners concede (Pet. 16) that *Olmstead* v. *United States*, 277 U. S. 438, stands squarely in the way of their claim that their constitutional rights were violated,[2] and frankly predicate their contention upon the hope of reversal of that case. In that case this Court held that wire-tapping did not constitute a "search" within the Fourth Amendment. The majority opinion rests upon an interpretation of the Fourth Amendment as being limited to searches of "material things" such as may be seized, and upon the circumstance that

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[2] The *Olmstead* case also precludes reliance upon a State statute as the basis for excluding evidence offered in a Federal court, 277 U. S. 469. It seems clear, moreover, that the New York statute referred to by petitioners (Pet. 16) is on its face inapplicable to law enforcement officials. The statute provides as follows: "Eavesdropping.—A person who secretly loiters about a building, with intent to overhear a discourse therein, and to repeat or publish the same to vex, annoy, or injure others, is guilty of a misdemeanor." L. 1923, c. 642, Sec. 721 of the Penal Code of New York. Cf. *People* v. *Hebbard*, 96 Misc. 617, 620–621 (Sup. Ct. N. Y.) holding New York statute prohibiting wire-tapping inapplicable to police officers engaged in official duties (Consol. laws N. Y., c. 41, Sec. 1423, Par. 6).

there was "no entry of the houses or offices of the defendants." 277 U. S. at p. 464.

It is the position of the Government that the *Olmstead* case was correctly decided and that nothing in the present case warrants a reconsideration of that decision. The views of the Government as to the soundness of the majority opinion in the *Olmstead* case are fully set forth in our brief on the merits in *Weiss* v. *United States,* No. 42, October Term, 1939, pp. 46–55, to which the Court is respectfully referred.

As we pointed out in our brief in the *Weiss* case (pp. 52–53), so long as exploratory searches are forbidden by the Fourth Amendment (*United States* v. *Lefkowitz,* 285 U. S. 452) and a warrant must particularly describe "the persons or things to be seized," a reversal of the *Olmstead* decision would probably result in removing the entire subject from the purview of congressional policy where it has hitherto been thought to reside. *Olmstead* v. *United States, supra,* at pp. 465–466; *Nardone* v. *United States,* 302 U. S. at 383; and see concurring opinion of Judge A. N. Hand in *United States* v. *Polakoff,* 112 F. (2d) 888, 890 (C. A. A. 2, 1940), certiorari denied October 14, 1940, No. 295, present Term. Legislation now pending in Congress to authorize wiretapping in appropriate cases and with proper safeguards is based on the assumption that it remains within the power of the legislature to permit this type of policing activity. H. R. 4228, 77th

Cong., 1st Sess. But if this Court should overrule the *Olmstead* case this tentative experimental approach to a difficult socio-political problem would necessarily have to be abandoned in favor of the far more rigorous constitutional prohibition.

Furthermore, we doubt that the Goldmans are in a position to complain of the eavesdropping. The evidence in question was obtained by overhearing conversations in Shulman's office. Thus, even if the use of a detectaphone constitutes a search within the meaning of the Fourth Amendment, only Shulman's office was "searched" and there is no suggestion that the "persons, houses, papers, and effects" of the other two petitioners were seized, examined, or otherwise interfered with. It has been uniformly held that the legality of a search can be questioned only by the owner or lawful tenant of the premises searched.[3] Moreover, Theodore Goldman did not participate in any of the conversations overheard, and such portions of Martin Goldman's conservations as were overheard tended to support his defense rather than to incriminate him (R. 390–405).

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[3] *Lewis* v. *United States*, 92 F. (2d) 952 (C. C. A. 10, 1937); *United States* v. *Muscarelle*, 63 F. (2d) 806 (C. C. A. 2, 1933), certiorari denied, 290 U. S. 642; *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3, 1937), certiorari denied, 302 U. S. 759; *Belcher* v. *United States*, 50 F. (2d) 573 (C. C. A. 8, 1931); *Shore* v. *United States*, 49 F. (2d) 519 (D. C. App., 1931), certiorari denied, 283 U. S. 865; *Ingram* v. *United States*, 113 F. (2d) 966 (C. C. A. 9, 1940); *Creech* v. *United States*, 97 F. (2d) 390 (C. C. A. 5, 1938). Cf. *Agnello* v. *United States*, 269 U. S. 20, 35.

II

Petitioners' contention that Section 605 of the Federal Communications Act was violated when the Federal Bureau of Investigation agents overheard one end of several telephone conversations as they were being spoken into the receiver is without merit. See *United States* v. *Weiss*, 34 F. Supp. 99, 101 (S. D. N. Y., 1940). In the first place, there was no interception of a telephone communication. Shulman's words were overheard, not intercepted.[4] His message proceeded undisturbed from its author to the telephone receiver and over the wires to the other parties, without any infringement by the agents upon this privileged channel of communication. As a matter of elementary physics, that energy which was transformed into electrical vibrations by the telephone was neither identical with nor the cause of the impulses which penetrated the wall and activated the delicate crystal in the detectaphone, although both had a common source in Shulman's vocal cords. Moreover, it is of the essence of a telephone interception that the interceptor is placed in a position to hear both

[4] Neither of the Goldmans participated in any of the telephone conversations which were overheard. As we have said, these petitioners cannot complain of an invasion of Shulman's privacy as a breach of their constitutional rights. It can hardly be supposed that a stricter doctrine will be applied to protect the immunities derived from Section 605 of the Federal Communications Act. *United States* v. *Seeman*, 115 F. (2d) 371, 374 (C. C. A. 2, 1940).

parties to the conversation. Cf. *United States* v. *Polakoff, supra.*

Not only was there no interception, but that which the agents overheard did not constitute a telephone communication within the meaning of Section 605. Mere "intent that [the words] constitute a telephone communication," the basis of the petitioners' argument on this aspect of the case (p. 18) can hardly bring a message within the scope of the Communications Act. A servant may be instructed to make a telephone call, yet no one would contend that an eavesdropper who heard the instruction given had intercepted a telephone conversation. It is now possible, and not uncommon, to make recordings of responses to incoming telephone calls for use when the telephone subscriber will be unable to answer his telephone. It does not seem reasonable to apply the prohibitions of Section 605 to one who overhears the preparation of such a recording. Finally, we may suggest the case of a letter intended for the mails, where it will be within the protection of the Fourth Amendment (*Ex parte Jackson,* 96 U. S. 727); but the recollection of a stenographer and her notes of dictation are nevertheless unquestionably proper sources of evidence. So, the user of a telephone entrusts his message to the circumambient air which, indifferently, conveys his words to telephone pick-up, friendly bystanders, casual eavesdroppers, or officers of the law bent on securing evidence.

III

Petitioners' complaint that the trial judge denied them an opportunity to inspect notes and memoranda constituting part of the records of the Federal Bureau of Investigation presents no question worthy of review by this Court on certiorari. The ruling was right not only on the ground that the notes and memoranda were not used by the witnesses to refresh their recollection on the stand, *Lennon* v. *United States,* 20 F. (2d) 490 (C. C. A. 8, 1927); *Mullaney* v. *United States,* 82 F. (2d) 638, 643 (C. C. A. 9, 1936),[5] but also on the alternative ground that the documents called for were privileged official communications. Department of Justice Circular No. 3229, May 2, 1939; *Ex parte Sackett,* 74 F. (2d) 922 (C. C. A. 9, 1935); *Boske* v. *Comingore,* 177 U. S. 459. Similarly, it cannot be said that the trial court abused its discretion in refusing to exhibit these papers to defense counsel at the preliminary hearing on the ground that to do so would have resulted in a premature disclosure of the Government's evidence (R. 108–111, 127, 477). See, *Nardone* v. *United States,* 308 U. S. 338, 342; *United States* v. *Seeman,* 115 F. (2d) 371, 374–375 (C. C. A. 2, 1040). Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 233–234.

[5] *United States* v. *Socony-Vacuum Oil Co.,* 105 F. (2d) 809, 837 (C. C. A. 7, 1939), cited by petitioners (Pet. 19) as declaring the right to inspect memoranda "consulted for refreshment before trial," was a case where the grand jury's

CONCLUSION

No special and important reason for the exercise of the discretionary power to review on certiorari has been shown in this case. The decision below is clearly correct, and the petitions point to no conflict of decision in the lower Federal courts. The constitutional issue involved is settled by the decision of this Court in the *Olmstead* case. We, therefore, respectfully submit that the petitions should be denied.

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MAY 1941.

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minutes were actually used at the trial to refresh the recollection of a witness on the stand. And the decision of the Circuit Court of Appeals that opposing counsel had the right to inspect under these circumstances was one of the points upon which this Court reversed the case. 310 U. S. 150, 231–234.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 962, 980.

MARTIN M. GOLDMAN and THEODORE GOLDMAN,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS.

MARTIN M. GOLDMAN and
THEODORE GOLDMAN,
Petitioners,
by JACOB W. FRIEDMAN,
Attorney for Petitioners.

MARK SERVICE, BARCLAY 7-2180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

MARTIN M. GOLDMAN and THEODORE GOLDMAN, Petitioners, against UNITED STATES OF AMERICA, Respondent.	Nos. 962, 980.

REPLY BRIEF ON BEHALF OF PETITIONERS.

I.

There are more than three questions presented for review.

Respondent's brief may give the impression (p. 2) that the only questions raised are the three there indicated. A reference to petitioners' original brief (p. 14) shows that in addition to the five errors there specifically treated, petitioners declared their intention "to urge all the errors assigned (3154-3194)." In the interests of brevity these were not elaborated in the petition or brief, but they are actually important and substantial. Upon the granting of full review by this Court all of those errors will be presented and briefed.

II.

The illegal trespass directly aided the installation and utilization of the detectaphone device.

Respondent admits (p. 5) that "Turner, who had been in Shulman's office the previous night, described its ar-

rangement to Schroeder." Schroeder was the technician who supervised the installation of the detectaphone, while Turner was the agent who had concededly gained illegal access to Shulman's office the night before. Respondent admits further (footnote, p. 8) "that agent Turner * * * described the layout of the office to him [Schroeder] and that this helped somewhat in selecting a location for the detectaphone."

Here we have the clear and unequivocal concession by the prosecution that the trespass and consequent invasion of Shulman's constitutional rights aided the agents in their subsequent employment of the detectaphone. Regardless of the attempted argument that the location of the detectaphone was also facilitated by a process of trial and error, the conclusion is inescapable that the instrumentality of overhearing was attended with the initial vice of a trespass. To argue that Schroeder, in ascertaining the most suitable point for the affixation of the detectaphone, contrived to rid his mind of the data imparted by Turner, is to advance a sheer absurdity and to impute to him a superhuman ability to banish from his recollection information that was necessarily advantageous in accomplishing the task in hand. Respondent's strained argument in this connection is completely refuted by the circumstance that Turner was then imparting the information to Schroeder for the express purpose of assisting the placing of the detectaphone, and Schroeder could scarcely have been fashioning his conduct to conform to an anticipated attack upon its constitutional propriety.

Moreover, it appears from Petitioners' Exhibit 1 (2854-2859), the floor plan of Shulman's suite, that the suite consisted of three rooms, only two of which abutted on Room 1508 (where the detectaphone had to be installed) and even those two rooms were divided by a wall. Therefore, the inevitable consequence of the trespass was to reveal and make available to the government agents at

least three indispensable facts: (1) that Shulman's private office was one of the two rooms that had a wall in common with Room 1508, which in consequence was the right location for the installation of a detectaphone; (2) that the half of Room 1508 which was nearer to the window was the portion directly adjoining Shulman's office; and (3) finally, that the spot where the "trial and error" method should have its genesis was the area on the wall nearest to the window and directly in line with Shulman's desk on the other side. When the trial and error factor is scrutinized, it becomes rather apparent that the process in which the respondent now takes refuge consisted in the main of moving the detectaphone about in a minute area for the purpose of eliminating distinctly local interference such as a beam or dead spot.

III.

The case is not governed by the authorities dealing with searchlights or eavesdropping.

Respondent urges (p. 8) that the situation herein is to be assimilated to those where the use of a searchilght or field glasses or eavesdropping has been held not to affect the admissibility of evidence obtained thereby. It is submitted that none of the means indicated is comparable to a detectaphone enabling the users scientifically to project their auditory faculties through a wall and into the privacy of a conversation in a closed room. The Circuit Court's analogy that this was a mere use of a mechanical aid to the human senses is fallacious in that no person standing outside could normally hear the room conversation any more than he could read a letter on the desk. If he equipped himself with a scientific device that enabled him to accomplish either of these things, he would be just as effectively invading the privacy of the room as

if he had crossed the threshold. Neither a searchlight nor a field glass—nor, for that matter, the "use of a common aid to hearing by a person somewhat deaf" (opinion of Circuit Court of Appeals)—does more than can be effected by a person looking through a window at close range or, in the other case, by a person standing in the immediate vicinity of the speaker. A man's actions and words are always exposed to the possibility that they may be observed or overheard through the employment of the normal faculties of persons to whom they are not directed—which faculties may in some instances be rendered effective by common everyday aids to vision and hearing. The risk is controlled by the construction of his curtilage—such as the choice of doors, windows, thickness of walls and other safeguards of privacy. When one is heedless of his right of privacy it is to be expected that open doors, walls penetrable by the human voice, uncovered windows, field glasses, telescopes, aids to deaf persons, or flashlights, may be utilized. But who can possibly contemplate or anticipate that the insignificant vibrations of a wall occasioned by an ordinary conversation within the privacy of one's own home will be scientifically seized from without, drawn through the wall and converted into electrical impulses that in turn are transformed by an electric amplifier into their original spoken form and tenor? Even a stone wall presents no barrier to the efficacy of a detectaphone (285):

> "Q. * * * Can you take that through a stone wall? A. It is possible, yes."

Directly apposite is the carefully reasoned holding of the New York Court of Appeals in *Forbell* v. *City of New York*, 164 N. Y. 522, that "trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated." That being the law, it follows that the acts of the agents

were an unmistakable trespass and that all of the sequelae must be judicially condemned.

IV.

These petitioners are entitled to the benefit of the constitutional immunity vouchsafed to the petitioner Shulman.

Respondent doubts (p. 11) that the Goldmans are in a position to question the evidence obtained by overhearing conversations in Shulman's private office. It is also stated that "such portions of Martin Goldman's conversations as were overheard tended to support his defense rather than to incriminate him." So they did. However, that circumstance does not entitle the prosecution to avail itself of any damaging inferences that might be drawn from the overheard conversations of Shulman. Respondent suggests that the legality of a search can be questioned only by the owner or lawful tenant of the premises involved. None of the cases cited are applicable to the instant situation, for here the objection is likewise made by Shulman himself. Once he raises the point, all defendants are entitled to its benefit. That is the necessary effect of the holding of this Court in *Weiss* v. *United States*, 308 U. S. 321, where a judgment of conviction was reversed as to one Goldstein because of the improper reception in evidence of intercepted telephone conversations, notwithstanding the fact that he was not a party to a single one of those conversations. As the Circuit Court of Appeals in the same case observed, 103 F. 2d 348 (and on this point the opinion was manifestly approved by the Supreme Court of the United States):

> "Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received."

The same discussion and authority apply with equal force in refutation of the similar argument made by respondent at p. 12, footnote 4, regarding intercepted telephone conversations to which the Goldmans were not parties.

Surely, if Shulman may claim immunity with respect to his statements uttered in the absence of the Goldmans, all the more should the Goldmans be afforded that same beneficent protection when they were powerless to disavow such utterances.

V.

The illegal interception and divulgence of telephone communications are available to these petitioners.

In this connection the Court is respectfully referred to our argument under Section IV, above.

VI.

There was an interception of telephone communications.

In its effort to avoid the controlling effect of Section 605 of the Federal Communications Act, respondent resorts to a refinement of argument that completely ignores the unmistakable import of the statute. No reasoning can detract from the inexorable fact that Shulman was speaking on the telephone and that his words constituted a telephone communication in the course of transmission when it was intercepted. It is not necessary to constitute a violation that the words of both parties to a conversation be overheard. Indeed, the statute does not use the word "conversation" at all, but refers only to "communications." There can be no doubt that what one person says over a telephone to another is a communication in the full sense of the words.

VII.

The withheld memoranda were not privileged official communications.

Respondent argues (pp. 7, 14) that the trial court denied petitioners the right to inspect documents used to refresh the recollections of government witnesses on the ground that they were privileged official communications. In this contention respondent is clearly in error. A careful reading of the transcript (1412, 1415-1416, 1446-1453) demonstrates that both objection of respondent and the ruling of the trial court denying the inspection were predicated exclusively upon the ground that the documents were not actually used by the witnesses while testifying. The question of privileged official communications was never raised by the prosecution (1446).

Conclusion.

For the foregoing reasons, as well as those specified in the petitions and main brief, it is respectfully submitted that the petitions should be granted.

May , 1941.

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